INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	8
Argument:	
I. A person may properly be indicted, convicted, and punished both for conducting an illegal gambling business involving five or more persons in violation of 18 U.S.C. 1955 and for conspiring to commit that offense in violation of 18 U.S.C. 371:	
A. Wharton's Rule is a narrow exception to the usual principle that a substantive offense and a conspiracy to commit it are separate and distinct crimes for which one may be separately indicted, convicted, and punished; it precludes separate punishment only where it is logically impossible under any circumstances to commit the substantive crime without also committing the conspiracy	15
B. Wharton's Rule does not preclude separate punishment for a violation of 18 U.S.C. 1955 and a conspirary to commit that	

563-238—74——1

Argument—Continued Page

offense, because it is possible to commit the substantive crime without conspiring to do so; the punishment provided by Congress for a violation of Section 1955 does not include punishment for a conspiracy 27

C. Wharton's Rule is also inapplicable to the present case because the indictment charged and the evidence showed that the conspiracy involved more persons than the minimum number necessary to commit the substantive offense 35

D. The rule of lenity does not preclude separate punishment for the two offenses in this case 39

II. Even if Wharton's Rule were applicable to this case, it would simply preclude cumulative punishment; a new trial would not be required 43

Conclusion 57

CITATIONS

Cases:

American Tobacco Co. v. *United States*, 328 U.S. 781 35

Anderson v. *United States*, No. 73-346, decided June 3, 1974 55

Ashe v. *Swenson*, 397 U.S. 436 20

Bell v. *United States*, 349 U.S. 81 ..... 12, 40

Berra v. *United States*, 351 U.S. 131 49

Blockburger v. *United States*, 284 U.S. 299 ..... 20, 22

Braverman v. *United States*, 317 U.S. 49 17

Burton v. *United States*, 202 U.S. 344 25

Cases—Continued

	Page
Callanan v. *United States*, 364 U.S. 587	9, 13, 17, 18, 24, 33, 40, 42, 47
Chadwick v. *United States*, 141 Fed. 225	35
Clune v. *United States*, 159 U.S. 590	18, 19
Curtis v. *United States*, 67 F. 2d 943	34
Diaz v. *United States*, 223 U.S. 442	21
Ekberg v. *United States*, 167 F. 2d 380	21, 49, 53
Fuller v. *United States*, 407 F. 2d 1199, certiorari denied, 393 U.S. 1120	21, 49, 54
Gebardi v. *United States*, 287 U.S. 112	6, 9, 11, 16, 17, 19, 24, 32, 36, 45
Gore v. *United States*, 357 U.S. 386	22, 39, 41
Grafton v. *United States*, 206 U.S. 333	21, 46
Heflin v. *United States*, 358 U.S. 415	41
Keeble v. *United States*, 412 U.S. 205	49
Ladner v. *United States*, 358 U.S. 169	12, 40
Laughter v. *United States*, 259 Fed. 94, certiorari denied, 249 U.S. 613	35
Lisansky v. *United States*, 31 F. 2d 846, certiorari denied, 279 U.S. 873	35
Lutwak v. *United States*, 344 U.S. 604	55
Mares v. *United States*, 383 F. 2d 805	56
Morissette v. *United States*, 342 U.S. 246	30
Morrison v. *California*, 291 U.S. 82	10, 24, 25, 32, 35
Nielsen, In re, 131 U.S. 176	21
North Carolina v. *Pearce*, 395 U.S. 711	21
O'Leary, Ex parte, 53 F. 2d 956, certiorari denied, 283 U.S. 830	24, 25
Ottomano v. *United States*, 468 F. 2d 269, certiorari denied, 409 U.S. 1128	55
Pereira v. *United States*, 347 U.S. 1	18, 20, 21, 33
Pettibone v. *United States*, 148 U.S. 197	17, 20, 50
Pifer v. *United States*, 245 F. 2d 704	34
Pinkerton v. *United States*, 328 U.S. 640	16, 17, 18, 19, 21, 45

Cases—Continued

Page
Prince v. *United States*, 352 U.S. 322 41
Sansone v. *United States*, 380 U.S. 343 49
Sealfon v. *United States*, 332 U.S. 575 20
Shannon v. *Commonwealth*, 14 Pa. 226 ..... 13, 23, 46, 47
St. Clair v. *United States*, 154 U.S. 134 55
State v. *Clemenson*, 123 Ia. 524, 99 N.W. 139 23
State v. *Fritz*, 133 N.C. 725, 45 S.E. 957 23
United States v. *Annunziato*, 293 F. 2d 373, certiorari denied, 368 U.S. 919 55
United States v. *Becker*, 461 F. 2d 230, vacated and remanded on other grounds, May 28, 1974, No. 72–158 ..... 7, 29, 37
United States v. *Benter*, 457 F. 2d 1174 39
United States v. *Berger*, 433 F. 2d 680, certiorari denied, 401 U.S. 962 55
United States v. *Binder*, 453 F. 2d 805, certiorari denied, 407 U.S. 920 55
United States v. *Bobo*, 477 F. 2d 974, pending on petition for a writ of certiorari *sub nom. Gray* v. *United States*, No. 73–231 ..... 7–8, 32
United States v. *Chavez*, No. 72–1319, decided May 13, 1974 7
United States v. *Cordo*, 186 F. 2d 144, certiorari denied *sub nom. Minkoff* v. *United States*, 340 U.S. 952 34
United States v. *Costello*, 352 F. 2d 848, reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39 55
United States v. *Dietrich*, 126 Fed. 664 26
United States v. *Figueredo*, 350 F. Supp. 1031, reversed *sub nom. United States* v. *Vaglica*, 490 F. 2d 799, pending on petition for a writ of certiorari *sub nom. Scaglione* v. *United States*, No. 73–1503 ..... 8, 38
United States v. *Hagan*, 27 F. Supp. 814 39

Cases—Continued

	Page
United States v. *Harary*, 457 F. 2d 471	49
United States v. *Harris*, 460 F. 2d 1041, certiorari denied, 409 U.S. 877	29
United States v. *Holte*, 236 U.S. 140	16, 45
United States v. *Hunter*, 478 F. 2d 1019, certiorari denied, 414 U.S. 857	8, 37
United States v. *Iannelli*, 480 F. 2d 919, certiorari denied, No. 73-103, May 28, 1974	4
United States v. *Katz*, 271 U.S. 354	16, 45
United States v. *Ketchum*, 320 F. 2d 3, certiorari denied, 375 U.S. 905	49
United States v. *Klein*, 247 F. 2d 908, certiorari denied, 355 U.S. 924	49
United States v. *Klock*, 210 F. 2d 217	34
United States v. *Mamber*, 127 F. Supp. 925	49
United States v. *Manson*, 494 F. 2d 804	8
United States v. *Meese*, 479 F. 2d 41	29
United States v. *Mendell*, 447 F. 2d 639, certiorari denied, 404 U.S. 991	56
United States v. *New York Cent. & H.R.R. Co.*, 146 Fed. 298, affirmed on other issues, 212 U.S. 481	25, 39
United States v. *Olweiss*, 138 F. 2d 798, certiorari denied, 321 U.S. 744	55
United States v. *Pacheco*, 489 F. 2d 554, pending on petition for a writ of certiorari, No. 73-1510	8
United States v. *Palmer*, 465 F. 2d 697, certiorari denied, 409 U.S. 874	29
United States v. *Parzow*, 391 F. 2d 240	34
United States v. *Pugliese*, 153 F. 2d 497	55
United States v. *Rabinowich*, 238 U.S. 78	18, 19, 42
United States v. *Sacco*, 491 F. 2d 995	29
United States v. *Sager*, 49 F. 2d 725	25, 39

Cases—Continued Page

United States v. *Schroeder*, 433 F. 2d 846, certiorari denied *sub nom. Allen* v. *United States*, 400 U.S. 1024 56
United States v. *Smith*, 343 F. 2d 847 55
United States v. *Tanner*, 471 F. 2d 128 55
United States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 ..... 41, 49
United States v. *Ushakow*, 474 F. 2d 1244 56
United States v. *Weber*, 437 F. 2d 327, certiorari denied, 402 U.S. 932 55
United States v. *Williams*, 435 F. 2d 642, certiorari denied, 401 U.S. 995 56
United States v. *Winters*, 158 F. 2d 674 34
Waller v. *Florida*, 397 U.S. 387 21
Ward v. *Commonwealth*, 132 Ky. 636, 116 S.W. 786 22–23

Statutes and rule:

Organized Crime Control Act of 1970, Title VIII, 84 Stat. 922, 936 29
18 U.S.C. 111 48
18 U.S.C. 201(c) 26
18 U.S.C. 371 ..... 2, 17, 31, 33
18 U.S.C. 1302 ..... 3, 4
18 U.S.C. 1341 33
18 U.S.C. 1342 3
18 U.S.C. 1952 ..... 3, 4, 6
18 U.S.C. 1951 42
18 U.S.C. 1955 ..... 2, 3, 4, 6, 7, 10, 11, 13, 15, 17, 27, 28, 29, 31, 33, 36, 40, 43, 50, 53, 54, 56
18 U.S.C. 2314 33
18 U.S.C. 4208(a)(2) 4, 5
18 Pa. Consol. Stat. 5512 5
18 Pa. Consol. Stat. 5513 5
18 Purdon's Pa. Stat. 4601 5

Statutes and rule—Continued

	Page
18 Purdon's Pa. Stat. 4607	5
Rule 35, Fed. R. Crim. P	48
Rule 31(c), Fed. R. Crim. P	49

Miscellaneous:

A.L.I., *Model Penal Code*, Tent. Draft No. 10 (1960)	51
Anderson, *Wharton's Criminal Law and Procedure*, Vol. 1, § 89 (1957)	16, 36
Anderson, *Wharton's Criminal Law and Procedure*, Vol. 2, § 848 (1957)	22
Devitt & Blackmar, *Federal Jury Practice and Instructions*, Vol. 1, § 17.11 (2d ed. 1970)	49
H. Rep. No. 91–1549, 91st Cong., 2d Sess	29
S. Rep. No. 91–617, 91st Cong., 1st Sess	30
Note, *Developments in the Law-Criminal Conspiracy*, 72 Harv. L. Rev. 920 (1959)	36, 39
Wharton, *Criminal Law*, Vol. 2, § 1604 (12th ed. 1932)	16, 44, 45, 52
Williams, *Criminal Law*, § 164 (1953 ed.)	16
Wright, *Federal Practice and Procedure*, Vol. 1, § 145 (1969)	48

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-64

ROBERT E. IANNELLI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-27a) is reported at 477 F. 2d 999. The opinion of the district court (Pet. App. 1a-21a) is reported at 339 F. Supp. 171.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1973. A petition for rehearing was denied on June 6, 1973 (Pet. App. 29a). The petition for a writ of certiorari was filed on July 5, 1973, and was granted on May 28, 1974. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Wharton's Rule makes it improper to indict, convict, or sentence a person both for conducting an illegal gambling business involving five or more persons in violation of 18 U.S.C. 1955 and for conspiring to commit that offense in violation of 18 U.S.C. 371.

STATUTES INVOLVED

1. 18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *

2. 18 U.S.C. 1955 provides in pertinent part:

> (a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.
>
> (b) As used in this section—
>
> (1) "illegal gambling business" means a gambling business which—
>
> (i) is a violation of the law of a State or political subdivision in which it is conducted;
>
> (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and
>
> (iii) has been or remains in substantially continuous operation for a period

in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, book making, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. * * *

STATEMENT

A six-count indictment (A. 14–23) was filed in the United States District Court for the Western District of Pennsylvania charging petitioners with a variety of federal gambling offenses. Count 2 charged that all eight petitioners and six co-defendants "did knowingly and wilfully conduct, finance, manage, supervise, direct, and own an illegal gambling business," in violation of 18 U.S.C. 1955 (A. 21). Count 3 charged that petitioner Iannelli and a co-defendant used Western Union tickertape facilities in interstate commerce with intent to promote an illegal gambling business, in violation of 18 U.S.C. 1952 (A. 21–22). Counts 4 and 5 charged petitioner Iannelli with mailing gambling paraphernalia, in violation of 18 U.S.C. 1302 (A. 22), and count 6 charged him with using a fictitious name for the purpose of conducting, by means of the Postal Service, unlawful bookmaking activities, in violation of 18 U.S.C. 1342 (A. 23).

Count 1 charged that all eight petitioners, together with six co-defendants and eleven unindicted co-conspirators, conspired to commit violations of 18 U.S.C. 1302, 1952, and 1955 (A. 14–20).

After a jury trial, all eight petitioners were convicted of conducting an illegal gambling business

563-238—74——2

(count 2) and of conspiring to commit that offense (count 1).[1] Petitioner Iannelli was also convicted of mailing gambling paraphernalia (count 4) and using a fictitious name (count 6).[2]

On the substantive counts, petitioners were fined and sentenced both to imprisonment and to subsequent periods of probation; on the conspiracy count, they were sentenced to periods of probation to run concurrently with, and (except for petitioner Iannelli) longer than, the periods of probation imposed on the substantive count (A. 9–11).[3]

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[1] Although count 1 also charged petitioners with conspiring to violate 18 U.S.C. 1302 and 1952, the district court ruled that the government's evidence was insufficient to show a conspiracy to commit those offenses (Tr. 2409). The court accordingly instructed the jury with respect to count 1 only on the charge of conspiring to violate Section 1955 (A. 55–62).

"Tr." refers to the transcript of the trial proceedings, which is part of the record in this case.

[2] The district court granted motions for judgment of acquittal on counts 1 and 2 as to four of the co-defendants (A. 6–7; Tr. 2299, 2313, 2323, 2360, 2409). It also granted petitioner Iannelli's motion for judgment of acquittal on counts 3 and 5 (A. 7; Tr. 2250, 2257). A fifth co-defendant died prior to trial. The jury was unable to reach a verdict with respect to another co-defendant, Dolores Iannelli. She was later retried and convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. See *United States* v. *Dolores Iannelli*, 480 F. 2d 919 (C.A. 3), certiorari denied, No. 73-103, May 28, 1974.

[3] On the substantive count, petitioners Diulus, Orlansky, and Scolieri were each fined $15,000 and one-eighth of the cost of the prosecution, and each was sentenced to a term of two years' imprisonment (subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2)), to be followed by a period of three years' probation. Petitioners Cammaratta, Cancilla, Fusaro, and Gobos were each fined $10,000 and one-eighth of the cost of prosecution, and each was sentenced to a term of 18 months' imprisonment; the prison term was suspended for each,

The prosecution's evidence, much of which was based on information derived from a court-ordered wire interception, showed that between October 16, 1970, and March 25, 1971, petitioners conspired to conduct and did conduct a substantial bookmaking operation, accepting bets and wagers on races, sporting events, and numbers. On two weekends during the period covered by the conspiracy, the operation accepted nearly $250,000 in wagers (Tr. 1831–1834). These activities were in violation of Pennsylvania law.[4] Petitioners neither testified nor presented any other evidence.

In one of many pre-trial motions, petitioners sought dismissal of the conspiracy count of the indictment on

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however, on the condition that he remain confined in a jail-type institution for three months (six months for Fusaro); in addition, each was placed on probation for three years to commence upon completion of the prison term.

Petitioner Iannelli was fined a total of $22,000 plus one-eighth of the cost of prosecution; he was sentenced to a term of three years' imprisonment on count 2 (subject to 18 U.S.C. 4208(a)(2)), to be followed by a period of five years' probation; he was also sentenced to a concurrent term of two years' imprisonment on count 4, and to a period of five years' probation on count 6, to run concurrently with the period of probation on count 2.

In addition, each petitioner was sentenced to a period of five years' probation on the conspiracy count, to commence after imprisonment on the substantive counts and to run concurrently with the periods of probation on those counts.

[4] The conducting of lotteries and the engaging in pool-selling and bookmaking were, at the time of the conspiracy, proscribed by Pennsylvania's Penal Code of 1939 (18 Purdon's Pa. Stat. 4601 and 4607, set forth in appendix to present Title 18, Pa. Consol. Stat.). Under revisions of that Code, effective June 6, 1973, the substance of those provisions is now contained in 18 Pa. Consol. Stat. 5512 and 5513.

the ground that it was duplicative of the count charging a substantive violation of 18 U.S.C. 1955. They invoked "Wharton's Rule" as an exception to the general principle that "the commission of a substantive offense and a conspiracy to commit such offense are separate and distinct" (Pet. App. 19a). Wharton's Rule provides that, "where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy" (*Gebardi* v. *United States*, 287 U.S. 112, 122).

The district court denied the motions without prejudice to their renewal during trial (Pet. App. 19a–20a). It reasoned that count 1 charged a conspiracy to violate not only Section 1955 but also Section 1952. Moreover, the court stated, Wharton's Rule would apply only if the underlying substantive offense were actually consummated. "[I]t would serve little purpose, therefore, to dismiss only part of the count at this stage of the proceeding when we are not certain what facts might be proved at trial with respect to § 1955" (*id.* at 19a).

At trial, the district court submitted to the jury both the count charging a substantive violation of Section 1955 and—as limited by the court's instructions (see note 1, *supra*)—the count charging a conspiracy to commit that offense. After the jury returned verdicts of guilty as to both counts, the district court denied motions for a new trial and for judgments of acquittal notwithstanding the verdicts

(Supp. App. 1a–5a).[5] The court stated from the bench that Wharton's Rule was not applicable because "there were different elements involved in each count" and "different numbers of persons could be involved in each count" (*id.* at 4a).

The court of appeals affirmed (Pet. App. 23a–27a). It held, relying on *United States* v. *Becker,* 461 F. 2d 230 (C.A. 2), vacated and remanded on other grounds, May 28, 1974, No. 72–158, that Wharton's Rule does not apply, because the conspiracy charged in this indictment involved more than the minimum number of persons (five) whose participation in the operation of a gambling business is required for the commission of the substantive offense under Section 1955 (*id.* at 24a).

Because of the existence of a conflict among the courts of appeals on the Wharton's Rule issue, we acquiesced in the granting of the petition for a writ of certiorari with respect to that issue.[6] The petition also raised an issue—subsequently decided adversely to petitioners in *United States* v. *Chavez,* No. 72–1319, decided May 13, 1974—concerning the Justice Department's procedures for authorizing and applying for court orders permitting wire interceptions. After the decision in *Chavez,* this Court granted certiorari in the present case solely on the Wharton's Rule issue.

[5] "Supp. App." refers to the supplemental appendix to petitioners' brief.

[6] In addition to the Third Circuit in the present case and the Second Circuit in *Becker, supra,* the Fourth and Fifth Circuits have held that Wharton's Rule is no bar to the indictment, conviction, and punishment of a person for both the substantive offense under Section 1955 and the conspiracy to commit it. *United States* v. *Bobo,* 477 F. 2d 974 (C.A. 4), pending on

SUMMARY OF ARGUMENT

In the first part of this brief, we discuss the nature of Wharton's Rule, seek to identify the circumstances (rare, in our view) in which it has proper application, and demonstrate that it is not applicable in the instant case. This discussion proceeds on the premise that Wharton's Rule, where applicable, properly extends only to the preclusion of cumulative penalties for the conspiracy and the substantive offense.

In the second part of the brief we show that there is no basis in either logic or policy for the use of Wharton's Rule, assuming it is applicable, at any stage of the proceeding prior to sentencing. Specifically, Wharton's Rule, properly understood, cannot be utilized to bar indictment or submission to the jury of a conspiracy charge, but only double punishment.

I

A. A substantive criminal offense and a conspiracy to commit it ordinarily are separate and distinct crimes for which one may be separately indicted, convicted, and punished. A conspiracy is thought to pose "a greater potential threat to the public than individ-

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petition for a writ of certiorari *sub nom. Gray* v. *United States*, No. 73–234; *United States* v. *Pacheco*, 489 F. 2d 554 (C.A. 5), pending on petition for a writ of certiorari, No. 73–1510; *United States* v. *Vaglica*, 490 F. 2d 799 (C.A. 5), pending on petition for a writ of certiorari *sub nom. Scaglione* v. *United States*, No. 73–1503.

The Seventh Circuit stands alone among the courts of appeals in holding that Wharton's Rule applies in the context of Section 1955. *United States* v. *Hunter*, 478 F. 2d 1019, certiorari denied, 414 U.S. 857; *United States* v. *Manson*, 494 F. 2d 804.

nal delicts," because "[c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed" (*Callanan* v. *United States*, 364 U.S. 587, 593–594). Unlike an attempt, therefore, a conspiracy does not merge into the completed offense; it may be punished separately regardless of whether its substantive aim was consummated.

Wharton's Rule is a narrow exception to these principles. It precludes multiple punishment for a conspiracy and its consummated criminal objective only in the rare situation in which a substantive offense necessarily includes a conspiracy, so that it would be "impossible under any circumstances" to commit the substantive crime without conspiring to do so (*Gebardi* v. *United States*, 287 U.S. 112, 122). For example, the crime of dueling—which is a combat with deadly weapons engaged in by two persons pursuant to an agreement to do so—embraces the elements of a conspiracy (an agreement to pursue an unlawful objective and an overt act) and therefore could not be committed in the absence of a conspiracy. Cumulative punishment for the two offenses would be barred by Wharton's Rule, which, properly understood, is simply a specific application to conspiracy prosecutions of the more general rule, rooted in the Fifth Amendment's protection against double jeopardy, that forbids cumulative punishment for any two offenses arising out of the same conduct, where one offense is necessarily included within the other. In such circumstances, it is presumed that Congress intended the

563-238—74——3

punishment for the greater offense to include punishment for any necessarily included offense.

B. Wharton's Rule does not apply in the context of 18 U.S.C. 1955, because it is possible to commit the offense defined by that section without conspiring to do so. Although the statute requires proof that the illegal gambling business "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business," it does not require proof that each person involved in the business "shared in the guilty knowledge and design" (*Morrison* v. *California*, 291 U.S. 82, 93). One bookmaker could conduct an illegal gambling business involving five or more persons who, while performing functions necessary to the operation of the business, such as telephone answering, are unaware that the business involves illegal gambling. Their participation could satisfy the requirement that five or more persons "conduct * * * part of such business," even though none would have guilty knowledge or criminal intent. The statute makes it possible to prosecute a lone violator who operates a large enough business to warrant federal concern, but whose employees are unaware of the nature of the business they are conducting.

In those circumstances, the bookmaker would be guilty of the substantive crime but not of a conspiracy, because a conspiracy presupposes "a corrupt agreement between not less than two with guilty knowledge on the part of each" (*Morrison* v. *California*, *supra*, 291 U.S. at 92). It follows that a conspiracy requires proof of a fact—the existence of a corrupt agreement—not essential for conviction of the sub-

stantive gambling offense and consequently is not included within that offense. There is no reason, therefore, to presume that the punishment prescribed for the substantive gambling offense was intended by Congress to include punishment for a conspiracy to commit it.[7]

C. Even if Wharton's Rule might otherwise apply in the context of Section 1955, the facts of the present case bring into play the rule's traditional exception, which permits separate punishment for a conspiracy if "it contemplated the cooperation of a greater number of parties than were necessary to the commission of the principal offense" (*Gebardi* v. *United States, supra,* 287 U.S. at 122, n. 6). When the criminal combination includes more persons than the minimum number logically required for the commission of the substantive crime, its dangers exceed those that are inherent in the substantive offense itself. The presence of additional minds is thus an aggravating factor warranting punishment in addition to that prescribed for the substantive crime, for much the same reason that a conspiracy of two persons is separately punishable when the substantive crime can be committed by one.

The indictment here alleged a conspiracy involving

[7] We do not deny that it would be a rare case in which a violation of Section 1955 is charged where there are not at least two persons knowingly involved in the gambling operation and thus liable to conviction on the substantive charge. However, we believe that the correct analysis of the application of Wharton's Rule turns on the logical structure of the substantive offense rather than any pragmatic assessment of probabilities that it will in fact be committed by more than one person.

25 persons, and the jury found eight of them guilty of that charge. Thus, even if Wharton's Rule might otherwise be applicable, this case falls within the exception.

D. This Court's "rule of lenity" does not aid petitioners. We do not dispute the proposition that, where a statute and its legislative history are ambiguous concerning the appropriate unit of prosecution, the "doubt will be resolved against turning a single transaction into multiple offenses" (*Bell* v. *United States*, 349 U.S. 81, 84). This Court has accordingly held, for example, that transporting more than one woman in the same vehicle for immoral purposes is a single violation of the Mann Act (*Bell* v. *United States*, *supra*) and that the wounding of two federal officers by a single discharge of a gun constitutes only one offense (*Ladner* v. *United States*, 358 U.S. 169).

The issue here, however, is not whether conspiracy is an appropriate unit of prosecution, but whether Congress should be presumed to have intended only a single punishment for convictions of conducting an illegal gambling business and of conspiracy to do so. Where there is doubt concerning the intention of Congress with respect to the punishment of a substantive offense and a conspiracy to commit it, the rule of lenity gives way to a contrary presumption based upon the historic distinctiveness of the two crimes. This Court attributes to Congress a tacit purpose to maintain the distinction between the two offenses and the separate punitive consequences of each. "To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive con-

duct, and effectuate a reversal of the settled interpretation * * * would require specific language to the contrary" (*Callanan* v. *United States, supra,* 364 U.S. at 595).

II

Even if Wharton's Rule were applicable and this case were not within the exception to the rule, there would be no need to require a new trial. Although some courts have echoed Wharton's statement that a conspiracy to commit a substantive offense that requires cooperative action is not itself an indictable offense, that view is inconsistent with the true rationale of Wharton's Rule and appears to rest on Wharton's misreading of the first case in which the principle underlying his rule was applied (*Shannon* v. *Commonwealth,* 14 Pa. 226).

When a substantive offense necessarily includes a conspiracy, Wharton's Rule properly requires only that an indictment charging a conspiracy to commit that offense should be treated in the same manner as an indictment charging any other offense that is included within some greater crime. That the legislature has also defined a greater crime does not mean that a person may not be indicted for a separate crime included within it. It means only that a defendant may not be punished cumulatively for conduct that violates both provisions.

Thus, even if a defendant could not properly be given cumulative sentences for violating Section 1955 and for conspiring to do so, both charges could be submitted to the jury if there were a factual dispute over some element of the gambling offense that is not

an element of a conspiracy, such as whether a sufficient number of persons were involved in the conduct of the business. If the jury resolves the issue in the defendant's favor, it should be free to consider whether the evidence nevertheless establishes each element of the included conspiracy. The proper procedure, therefore, is to instruct the jury to consider the conspiracy charge if but only if it first determines that the defendant is not guilty of the substantive crime.

Although the district court did not follow this procedure because of its view, which we share, that Wharton's Rule is inapplicable, the appropriate disposition of this case, if this Court disagrees with that view, is to vacate petitioners' convictions on the conspiracy count, for which seven of them were given terms of probation that would exceed their probation terms on the substantive count.

Petitioners claim that a new trial is required because the district court permitted the jury to consider with respect to the substantive count hearsay evidence that would be inadmissible in the absence of the conspiracy charge. But the district court in fact instructed the jury here that it could consider the hearsay evidence only with respect to the conspiracy and not with respect to the substantive count. In any event, the co-conspirator exception to the hearsay rule is applicable upon independent proof of a joint criminal venture without regard to whether a conspiracy has been formally charged in the indictment, particularly where, as in this case, the charged substantive offense is deemed to include a conspiracy. Thus,

the same evidence would be admissible if there were to be a retrial on the Section 1955 count alone.

ARGUMENT

I

A PERSON MAY PROPERLY BE INDICTED, CONVICTED, AND PUNISHED BOTH FOR CONDUCTING AN ILLEGAL GAMBLING BUSINESS INVOLVING FIVE OR MORE PERSONS IN VIOLATION OF 18 U.S.C. 1955 AND FOR CONSPIRING TO COMMIT THAT OFFENSE IN VIOLATION OF 18 U.S.C. 371

A. WHARTON'S RULE IS A NARROW EXCEPTION TO THE USUAL PRINCIPLE THAT A SUBSTANTIVE OFFENSE AND A CONSPIRACY TO COMMIT IT ARE SEPARATE AND DISTINCT CRIMES FOR WHICH ONE MAY BE SEPARATELY INDICTED, CONVICTED, AND PUNISHED; IT PRECLUDES SEPARATE PUNISHMENT ONLY WHERE IT IS LOGICALLY IMPOSSIBLE UNDER ANY CIRCUMSTANCES TO COMMIT THE SUBSTANTIVE CRIME WITHOUT ALSO COMMITTING THE CONSPIRACY

1. Wharton's Rule owes its name to Francis Wharton, whose treatise on criminal law contains the classic statement of the rule and its rationale:

> When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. * * * In other words, when the law says, "a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name," it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—*e.g.*, adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspir-

acy. * * * [2 Wharton, *Criminal Law* § 1604, p. 1862 (12th ed. 1932).][8]

Though it has never applied Wharton's Rule, this Court has alluded to it on several occasions. For example, in *Gebardi* v. *United States, supra,* 287 U.S. at 121–122, the Court referred to "those decisions which hold, consistently with the theory upon which conspiracies are punished, that where it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy." See also *United States* v. *Holte,* 236 U.S. 140, 145; *United States* v. *Katz,* 271 U.S. 354, 355; *Pinkerton* v. *United States,* 328 U.S. 640, 643.[9]

2. With respect to the circumstances in which Wharton's Rule applies, we are on common ground with petitioners: the rule applies only "where it is impossible under any circumstances to commit the substantive offense without cooperative action" (*Gebardi* v. *United States, supra,* 287 U.S. at 122). From this common premise, however, the parties reach opposite conclusions about whether the rule should be applied to cases in which the substantive offense is a violation

[8] The current edition of Wharton's treatise states the rule this way: "An agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission." 1 Anderson, *Wharton's Criminal Law and Procedure* § 89, p. 191 (1957).

[9] Wharton's Rule is not applied in the English courts, and the leading British commentator has stated that "the doctrine seems unnecessarily subtle." Williams, *Criminal Law,* § 164, p. 533, n. 3 (1953 ed.).

of 18 U.S.C. 1955 and, if it should, whether a new trial is required in this case. For that reason, and because the courts have not always applied Wharton's Rule with the precision that we think is required by its limited rationale, it is important to identify the source of the rule and its relationship to "the theory upon which conspiracies are punished" (*ibid.*).

Under 18 U.S.C. 371, it is a crime for two or more persons to "conspire * * * to commit any offense against the United States" if "one or more of such persons do any act to effect the object of the conspiracy * * *." "The gist of the crime * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts" (*Braverman* v. *United States,* 317 U.S. 49, 53), and it is this "collective planning of criminal conduct at which the statute aims" (*Gebardi* v. *United States, supra,* 287 U.S. at 121).

The legislative determination to proscribe "the combination of minds for [an] unlawful purpose" (*Pettibone* v. *United States,* 148 U.S. 197, 202), as distinct from the consummated crime, is bottomed on the judgment that "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts" (*Callanan* v. *United States,* 364 U.S. 587, 593). "It has ingredients, as well as implications, distinct from the completion of the unlawful project" (*Pinkerton* v. *United States, supra,* 328 U.S. at 644).

What special dangers are posed by a conspiracy? "Concerted action both increases the likelihood that the criminal object will be successfully attained and

decreases the probability that the individuals involved will depart from their path of criminality" (*Callanan* v. *United States, supra,* 364 U.S. at 593). It also often "makes possible the attainment of ends more complex than those which one criminal could accomplish" (*ibid.*). The danger is not limited, however, to the specific criminal object of the conspiracy. "Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed" (*id.* at 593–594), because it "involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices" (*United States* v. *Rabinowich,* 238 U.S. 78, 88).

For these reasons, "[i]t has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses" (*Pinkerton* v. *United States, supra,* 328 U.S. at 643), to which the legislature may "affix distinct and independent penalties" (*Clune* v. *United States,* 159 U.S. 590, 595). See also *Callanan* v. *United States, supra,* 364 U.S. at 593 ("The distinctiveness between a substantive offense and a conspiracy to commit [it] is a postulate of our law"); *Pereira* v. *United States,* 347 U.S. 1, 11; *United States* v. *Rabinowich, supra,* 238 U.S. at 86. In view of the historic differentiation of a conspiracy from its criminal object—"a distinction whose practical importance in the criminal law is not easily overestimated"—this Court "attribute[s] to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain" conspiracy as a crime sep-

arate from the substantive offense. *United States* v. *Rabinowich, supra,* 238 U.S. at 88.

The distinctiveness of the two offenses has several important practical consequences. First, a conviction for conspiracy may carry a heavier penalty than the substantive offense at which the conspiracy is aimed. *Clune* v. *United States, supra.*[10] Second, the conspiracy is a completed offense once the parties agree to pursue an unlawful end and one of them commits an overt act in furtherance of that end (see *Gebardi* v. *United States, supra,* 287 U.S. at 121): unlike an attempt, it does not merge into the completed substantive offense (*Pinkerton* v. *United States, supra,* 328 U.S. at 643).

The conspirators may therefore be indicted and punished separately for the conspiracy when the substantive offense has not been consummated (*United States* v. *Rabinowich, supra,* 238 U.S. at 86; *Callanan* v. *United States, supra,* 364 U.S. at 590) as well as when it has been consummated (*Pinkerton* v. *United States, supra,* 328 U.S. at 643; *United States* v. *Rabinowich, supra,* 238 U.S. at 86).

Because the crimes are distinctive, however, one cannot be convicted of a conspiracy if the indictment charges only the substantive offense. "[T]he combina-

[10] In *Clune*, the defendant had been sentenced to 18 months' imprisonment for conspiring to obstruct the passage of United States mails. The maximum punishment for commission of the substantive offense would have been a fine of $100. The Court stated: "Whatever may be thought of the wisdom or propriety of a statute making a conspiracy to do an act punishable more severely than the doing of the act itself, it is a matter to be considered solely by the legislative body" (159 U.S. at 595).

tion of minds for the unlawful purpose and the overt act in effectuation of that purpose must appear charged in the indictment" (*Pettibone* v. *United States, supra,* 148 U.S. at 202). And, since each offense requires proof of different elements, one may be prosecuted and convicted of both under either a single indictment or successive indictments. "[A] plea of double jeopardy is no defense to a conviction for both" (*Pereira* v. *United States, supra,* 347 U.S. at 11).[11]

3. Wharton's Rule is a narrow exception to these principles. It is rooted, we believe, in the Fifth Amendment's protection against double jeopardy and, properly viewed, is merely a specific application to conspiracy prosecutions of the more general rule that only a single punishment may be imposed upon convictions for two offenses where the two are identical or where one is necessarily included within the other.

As with any other two crimes, a substantive offense and the conspiracy to commit it are separate and distinct only if "each * * * requires proof of an additional fact which the other does not" (*Blockburger* v. *United States,* 284 U.S. 299, 304). If neither requires proof of a fact that the other does not, then the offenses are identical. In that event—since the double jeopardy clause protects not only against a second prosecution after conviction or acquittal of the same

[11] In some circumstances, however, where the jury's verdict of acquittal in a trial for one of the offenses amounts to a determination favorable to the defendant of the facts essential to conviction of the other offense, "*res judicata* may be a defense in a second prosecution" (*Sealfon* v. *United States,* 332 U.S. 575, 578). See also *Ashe* v. *Swenson,* 397 U.S. 436.

offense but also against multiple punishments for the same offense (*North Carolina* v. *Pearce*, 395 U.S. 711, 717)—a person may not be punished cumulatively for a single act or transaction that violates both provisions. See *Pereira* v. *United States*, *supra*, 347 U.S. at 11; *Pinkerton* v. *United States*, *supra*, 328 U.S. at 644.

If only one offense requires proof of an additional element not essential for conviction of the other—so that it would be impossible under any circumstances to commit the former without also committing the latter—then the latter is necessarily included within the former. As with identical offenses, cumulative punishment of the greater offense and the necessarily included offense is foreclosed. See *Fuller* v. *United States*, 407 F. 2d 1199, 1233, n. 52 (C.A. D.C. *en banc*), certiorari denied, 393 U.S. 1120; *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C.A. 1).[12]

This aspect of the double jeopardy protection is, of course, subject to the legislative will. Since the severity and allocation of punishment for criminal conduct "are peculiarly questions of legislative policy"

[12] Moreover, conviction or acquittal of either ordinarily bars subsequent prosecution for the other. See *In re Nielsen*, 131 U.S. 176, 187–190 (conviction of greater offense bars later prosecution for included offense); *Waller* v. *Florida*, 397 U.S. 387 (conviction of lesser bars later prosecution for greater); *Grafton* v. *United States*, 206 U.S. 333, 349–352 (acquittal of lesser bars later prosecution for greater, and (in dictum) acquittal of greater bars later prosecution for lesser). There may be exceptions, however. In *Diaz* v. *United States*, 223 U.S. 442, for example, the Court held that the double jeopardy clause of the Philippine Act would not bar a prosecution for homicide after a prior conviction of assault, where the victim died after the assault trial had ended.

(*Gore* v. *United States*, 357 U.S. 386, 393), Congress *could* properly determine that separate punishment may be imposed for commission of both the greater offense and the one necessarily included within it (cf. *id.* at 392–393). In the absence of a contrary indication of legislative purpose, however, it is reasonable to presume that Congress, in fixing the punishment for the greater offense, took into account all the conduct necessarily involved in the commission of that offense, including any portion of the conduct that would otherwise be punishable under some other provision.

These principles do not ordinarily apply to conspiracy cases. Since one may usually be convicted of conspiracy without proof that the substantive offense was consummated, and since few substantive crimes require proof of an agreement between two or more persons to pursue an unlawful object, each offense usually "requires proof of an additional fact which the other does not" (*Blockburger* v. *United States*, *supra*, 284 U.S. at 304), and each is therefore subject to separate punishment. Where two offenses have different elements, there is no reason to presume that the punishment prescribed by Congress for either one takes account of the conduct required for commission of the other.

In rare instances, however, a substantive crime may require proof of an agreement or conspiracy to commit it. The crime of dueling, for example, is commonly defined as "a combat with deadly weapons engaged in by two persons pursuant to an agreement to do so" (2 Anderson, *Wharton's Criminal Law and Procedure*, § 848, p. 719 (1957)). See *Ward* v. *Com-*

monwealth, 132 Ky. 636, 116 S.W. 786, 787; *State* v. *Fritz*, 133 N.C. 725, 45 S.E. 957. The elements of a conspiracy—agreement to pursue an unlawful objective and an overt act—are necessarily included within the definition of the substantive crime, and it would therefore be impossible to engage in a duel without also conspiring to do so. In the absence of a contrary indication of legislative intent, therefore, cumulative punishment for the dueling and for the conspiracy would be impermissible.[13]

The same would be true with respect to the other classic Wharton's Rule offenses—adultery, incest, and bigamy—but only in those jurisdictions where the mutual consent of both parties is an essential element of the offenses and where ignorance of the partner's marital status or consanguinity is not a defense. Compare *Shannon* v. *Commonwealth*, 14 Pa. 226 (consent apparently an element of adultery), with *State* v. *Clemenson*, 123 Iowa 524, 99 N.W. 139 (consent not an element of adultery). Since it would be impossible, in those jurisdictions, to commit the substantive offense without agreeing to do so, the substantive crime would necessarily include a conspiracy, and multiple punishment for the two offenses would be foreclosed.[14]

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[13] But, as explained in Part II, *infra*, indictment and trial on both charges would *not* be precluded.

[14] Where consent is not an element of the offense, however, it would be possible to commit it without an agreement to do so. A married man, for example, could commit adultery by raping a woman not his wife. The offense therefore would not necessarily include a conspiracy, and separate punishment for the two offenses would not violate double jeopardy protections. Similarly, if ignorance of the partner's marital status were a defense to a charge of adultery, the aware partner would alone

Whatever else Mr. Wharton may have understood his rule to mean, this, we submit, is its correct application consistent with "the theory upon which conspiracies are punished" (*Gebardi* v. *United States*, *supra*, 287 U.S. at 122). Since the substantive crime includes a conspiracy, it cannot be aggravated by a conspiracy. A conspiracy between two persons to engage in a duel or to commit adultery would pose no threat to society that would not be posed by commission of the offense itself.

Where the substantive crime can logically be committed without a conspiracy, however, a "collective criminal agreement" (*Callanan* v. *United States*, *supra*, 364 U.S. at 593) would be an aggravating factor enhancing the danger to the community, and Wharton's Rule would not apply. Thus, the crimes of giving or receiving a bribe or illegal rebate—occasionally referred to as Wharton's Rule offenses—are in fact quite unlike dueling and adultery. It is possible to give something with criminal intent though it is received innocently, or to receive with criminal intent something that is given innocently. Thus, one may be convicted of the crime of receiving a bribe, for example, regardless of the intentions of the giver and without proof of an agreement. See, *e.g.*, *Ex parte*

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be guilty of the substantive crime. But he would not be guilty of a conspiracy, because his partner would not have "shared in the guilty knowledge and design" (*Morrison* v. *California*, 291 U.S. 82, 93). It would, therefore, be possible to commit the substantive crime without a sufficient meeting of the minds to constitute a conspiracy.

O'Leary, 53 F. 2d 956 (C.A. 7), certiorari denied, 283 U.S. 830.[15]

Although cooperative action would be required in the sense that one must give to or receive from another, that cooperation would not amount to a conspiracy unless both "shared in the guilty knowledge and design" (*Morrison* v. *California*, *supra*, 291 U.S. at 93). "[C]onspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of both" (*id.* at 92). Conviction of conspiracy, therefore, would require proof of an additional element not essential for conviction of receiving the bribe, and the two offenses may be punished separately. Cases such as *United States* v. *Sager*, 49 F. 2d 725 (C.A. 2) (conspiracy to bribe a juror), and *United States* v. *New York Cent. & H. R. R. Co.*, 146 Fed. 298 (C.C. S.D. N.Y.), affirmed with respect to other issues, 212 U.S. 481, 500 (conspiracy to give and receive an illegal rebate), in which Whar-

[15] Where a statute made it a crime for a Congressman or federal officer to "receive or agree to receive any compensation * * * for any services rendered * * * in relation to any proceeding * * * in which the United States is a party," this Court held that a defendant could properly be charged, convicted, and punished separately for receiving the illicit compensation and for agreeing to do so. *Burton* v. *United States*, 202 U.S. 344. The Court stated (202 U.S. at 377):

"It was certainly competent for Congress to make the agreement to receive, as well as the receiving of, the forbidden compensation separate, distinct offenses. * * * There might be an agreement to receive compensation for services to be rendered without any compensation ever being in fact made, and yet that agreement would be covered by the statute as an offense. Or, compensation might be received for the forbidden services without any previous agreement, and yet the statute would be violated. * * *"

ton's Rule was applied in circumstances like these, are, we submit, wrongly decided.[16]

[16] A corollary of Wharton's Rule, however, might preclude cumulative punishment where an agreement by itself—without an overt act—constitutes the substantive crime. The federal bribery statute, for example, makes it a crime for a public official, *inter alia*, to "agree to receive anything of value * * * in return for * * * being influenced in his performance of any official act" (18 U.S.C. 201(c)). A public official who agreed with another person to receive a bribe from him could be convicted under that statute without proof that either party committed an overt act in furtherance of the agreement. If both parties entered into the agreement with guilty knowledge and if either one committed an overt act, then each would be guilty as well of conspiracy. The conspiracy in these circumstances would necessarily include the agreement to receive the bribe. The imposition of cumulative punishment upon a conviction for both offenses would therefore be impermissible.

This corollary rule is occasionally confused with Wharton's Rule, which applies where the conspiracy is necessarily included within the substantive offense, and, like Wharton's Rule, it is occasionally misunderstood. In *United States* v. *Dietrich*, 126 Fed. 664 (C.C. D. Neb.), for example, a United States Senator and another person were charged with conspiracy to violate the former bribery statute. The indictment alleged that the Senator had agreed with his co-defendant "to take and receive" (*ibid.*) a sum of money from the co-defendant for procuring an appointment as postmaster for the co-defendant. It also alleged that the co-defendant committed an overt act in furtherance of the agreement. If the substantive offense of agreeing to receive a bribe had also been charged, the Senator could not have received cumulative sentences for the two crimes. Since only the conspiracy had been charged, however, neither Wharton's Rule nor its corollary should have been applied. The court nevertheless erroneously concluded that Wharton's Rule was applicable and that the indictment must be dismissed. (As we show later in this brief (pp. 43–53, *infra*), it would have been improper in any event to dismiss the indictment even if the substantive crime had also been charged.)

B. WHARTON'S RULE DOES NOT PRECLUDE SEPARATE PUNISHMENT FOR A VIOLATION OF 18 U.S.C. 1955 AND A CONSPIRACY TO COMMIT THAT OFFENSE, BECAUSE IT IS POSSIBLE TO COMMIT THE SUBSTANTIVE CRIME WITHOUT CONSPIRING TO DO SO; THE PUNISHMENT PROVIDED BY CONGRESS FOR A VIOLATION OF SECTION 1955 DOES NOT INCLUDE PUNISHMENT FOR A CONSPIRACY

Petitioners' contentions in this case are founded upon a fundamental misconception concerning the proof required for conviction under 18 U.S.C. 1955. The statute provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business" shall be fined or imprisoned. It defines "illegal gambling business" as a gambling business which violates state law, operates for more than 30 days or has gross revenues of $2,000 in a single day, and "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business * * *."

Petitioners claim, in effect, that the offense defined by Section 1955, like the crime of dueling, necessarily includes a conspiracy to commit it and that Wharton's Rule is therefore applicable. Petitioners reason as follows. "In order to satisfy the statutory requirements of § 1955 a minimum of five must be intentional participants in an illegal gambling enterprise. If a minimum of five persons wilfully cooperate in such an illegal enterprise they must have done so by means of some agreement however tacit that may have been. Whatever the nature of the agreement of the five or more persons contemplated by § 1955, it is, in essence, a conspiracy" (Br. 6). Since, therefore, "[t]he very nature of § 1955 requires a conspiracy of a minimum of five" persons (Br. 17), it follows that "[t]here

is no element in the conspiracy that is not present in the substantive offense" (Br. 15).

The argument rests upon a faulty premise. The statute does not provide that each of the requisite five persons must be "intentional participants" who "wilfully cooperate in such an illegal enterprise" (Br. 6). The defendant himself, of course, must be shown to have had guilty knowledge or criminal intent, but it is no part of the proof required by Section 1955 that the other participants in the business also had criminal intent or that they were party to a corrupt agreement with the defendant. It is enough to prove that at least four other persons, even innocent persons, were involved in the conduct of some part of the business. The state of their minds and the extent of their knowledge are immaterial to the defendant's guilt or innocence.

Suppose, for example, that the government's evidence showed the following facts. A bookmaker employs a group of ten high school students on a part-time basis to answer telephones for him. He explains to each that the business involves sensitive market research assignments, that field workers will call to report over the telephone certain coded polling and census information, and that each student should simply write down the caller's name and the precise numbers he reports. None of the students is aware that the operation involves bookmaking.

On these facts, assuming that the operation violated state law and that it had sufficient daily gross revenues to satisfy Section 1955, would the bookmaker be entitled to a judgment of acquittal because the evi-

dence failed to show that the students had criminal intent? We think not. The proof would be sufficient to show that the bookmaker was conducting an illegal gambling business. It would also be sufficient to show that the business "involves five or more persons who conduct * * * part of such business" (18 U.S.C. 1955(b)(1)(ii)).[17]

Section 1955 was enacted as part of Title VIII of the Organized Crime Control Act of 1970. Although Congress found that "illegal gambling involves widespread use of, and has an effect upon, interstate commerce and the facilities thereof" (84 Stat. 922, 936), it determined "not to bring all illegal gambling activity within the control of the Federal Government, but to deal only with illegal gambling activities of major proportions" (H. Rep. No. 91-1549, 91st Cong., 2d Sess., p. 53). It therefore prohibited only those illegal gambling enterprises that involve five or more persons and that operate for more than 30 days

[17] Answering telephones in a bookmaking operation would be conducting part of the business within the meaning of Section 1955. "Congress' intent was to include all those who participate in the *operation* of a gambling business, regardless how minor their roles and whether or not they be labelled agents, runners, independent contractors or the like, and to exclude only customers of the business" (*United States* v. *Becker*, 461 F. 2d 230, 232 (C.A. 2), vacated and remanded on other grounds, May 28, 1974, No. 72-158; emphasis in original). See also *United States* v. *Harris*, 460 F. 2d 1041, 1049-1050 (C.A. 5), certiorari denied, 409 U.S. 877; *United States* v. *Palmer*, 465 F. 2d 697, 699 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Meese*, 479 F. 2d 41, 43 (C.A. 8); *United States* v. *Sacco*, 491 F. 2d 995, 1001-1003 (C.A. 9, *en banc*) ("Each person, whatever his function, who plays an integral part in the maintenance of illegal gambling, conducts an 'illegal gambling business' and is included within the scope of § 1955").

or have gross revenues of more than $2,000 in a single day. These requirements were designed to ensure that federal prosecutions are limited to gambling operations of a size and scope sufficient to warrant the allocation of federal law enforcement and prosecutorial resources.[18]

One criterion established by the statute to determine whether a particular gambling operation is large enough to come within the scope of its prohibition is the number of persons involved. If five or more are involved, that statutory standard is satisfied; there is no further requirement that each of the participants be shown to have acted with criminal intent.

It is true that Section 1955 uses the same words—"conducts, finances, manages, supervises, directs, or owns"—in defining the prohibited conduct and in stating the nature of the participation required by five or more persons, and there is nothing to suggest that Congress intended to depart from "the central thought that wrongdoing must be conscious to be criminal" (*Morissette* v. *United States,* 342 U.S. 246, 252). The ten innocent students, therefore, would not themselves be guilty of the crime even though by their acts they conducted part of the gambling business. No such implied element of scienter, however, must or should be

[18] Although the statute requires the participation of only five persons in the gambling business, Congress "anticipated that cases in which this standard can be met will ordinarily involve business-type gambling operations of considerably greater magnitude" (S. Rep. No. 91-617, 91st Cong., 1st Sess., p. 73). It did not establish a higher minimum, however, because it recognized that "it is usually possible to prove only a relatively small proportion of the total operations of a gambling enterprise" (*ibid.*).

read into the same words when they are used to establish a threshold requirement relating to the operation's size and scope.

Indeed, had Congress intended to require proof that at least five participants in the operation were criminally culpable, it could have avoided repetition of the words used to describe the participation. Section 1955 could have been written in the same form as the general conspiracy statute, 18 U.S.C. 371,[19] to provide that "if *five or more persons* conduct, finance, manage, supervise, direct, or own all or part of an illegal gambling business, *each* shall be fined or imprisoned." We think it is significant, therefore, that Congress chose the form it did. By providing that any person who conducts an illegal gambling business involving five or more persons shall himself be guilty of the offense, Congress left open the possibility of prosecuting a lone violator where the evidence shows that he operated a large enough business to justify federal concern but that his workers were unaware of the nature of the business they were conducting.

If we are correct in our view that the culpability of the other participants in the gambling operation is immaterial to the guilt or innocence of a defendant charged under Section 1955 with conducting an illegal gambling business, then it follows that Wharton's Rule is inapplicable in this case. The standard, again, is whether it is "impossible under any circumstances" to commit the substantive offense without cooperative

[19] Section 371 provides that, "[i]f two or more persons conspire * * * to commit an offense against the United States, * * * each shall be fined * * * or imprisoned * * *."

action amounting to a conspiracy (*Gebardi* v. *United States, supra,* 287 U.S. at 122). As we have just shown, it is possible to commit the crime of conducting an illegal gambling business without also conspiring to do so.

The bookmaker who hires ten innocent students to answer his telephone would be guilty of the substantive crime. But he would not be guilty of conspiring with them to commit the offense, "however guilty his own state of mind, unless [they] had shared in the guilty knowledge and design" (*Morrison* v. *California, supra,* 291 U.S. at 93). Conspiracy requires proof of "a corrupt agreement between not less than two with guilty knowledge on the part of each" (*id.* at 92). On the facts we have hypothesized, the students would not have the requisite knowledge, and neither they nor the bookmaker could be convicted of a conspiracy. Petitioners are incorrect, therefore, in stating that "[w]hatever the nature of the agreement of the five or more persons contemplated by § 1955, it is, in essence, a conspiracy" (Br. 6). The agreement between the bookmaker and each of his ten student employees is not a conspiracy because only the bookmaker has corrupt intentions.

The conspiracy, therefore, is not necessarily included within the substantive offense; it requires proof of a fact—*i.e.,* the existence of a corrupt agreement—not essential for conviction of the substantive crime.[20] Each offense may therefore be punished

[20] As the Fourth Circuit stated in *United States* v. *Bobo, supra,* 477 F. 2d at 987: "A gambling business, the operation of which is made unlawful by § 1955, may be operated without

separately. Since the conspiracy is not necessarily included within the crime of conducting an illegal gambling business, there is no basis for any presumption that Congress intended the punishment for the gambling offense to include punishment for a conspiracy to commit it.[21] Quite the contrary is true. Since the crime could be committed without a conspiracy, the "collective criminal agreement" (*Callanan* v. *United States, supra,* 364 U.S. at 593) involved in a conspiracy would be an aggravating factor for which separate punishment might be appropriate.

The situation here is therefore similar to that in *Pereira* v. *United States,* 347 U.S. 1. The two defendants in that case were charged with using the mails pursuant to a scheme to defraud (18 U.S.C. 1341), transporting securities in interstate commerce knowing them to have been obtained by fraud (18 U.S.C. 2314), and conspiring to commit those offenses (18 U.S.C. 371). The proof showed that the two defendants planned and executed an elaborate "confidence game" in order fraudulently to obtain money from a wealthy widow. They argued that "their conviction on both the substantive counts and a conspiracy to commit the crimes charged in the substantive counts constitutes double jeopardy" (347 U.S. at 11).

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the agreement of the minimum of five persons involved. The five persons need make no agreement; all they need to be is involved. * * *"

[21] A violation of 18 U.S.C. 1955 is punishable by a fine of not more than $20,000 or imprisonment for not more than five years or both. A violation of 18 U.S.C. 371 is punishable by a fine of not more than $10,000 or imprisonment for not more than five years or both.

The Court rejected that contention on the basis of reasoning that applies as well to petitioners' contentions in this case. "Only if the substantive offense and the conspiracy are identical," the Court stated, "does a conviction for both constitute double jeopardy" (*ibid.*). Unlike a conspiracy, however, "[t]he substantive offenses with which petitioners were charged do not require more than one person for their commission; either could be accomplished by a single individual" (*ibid.*). Moreover, "[t]he essence of the conspiracy charge is an agreement," whereas "conviction on the substantive counts does not depend on any agreement" (*ibid.*). "Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical" (*id.* at 11–12).[22]

[22] The lower federal courts have also frequently refused to apply Wharton's Rule where the substantive offense could be committed by one person alone and where conviction of the offense does not depend upon proof of a corrupt agreement among the participants. See, *e.g.*, *United States* v. *Parzow*, 391 F. 2d 240, 241 (C.A. 4) (conspiracy to use a facility in interstate commerce to facilitate the bribery of a public official); *Pifer* v. *United States*, 245 F. 2d 704, 705 (C.A. 4) (conspiracy to escape from federal custody); *United States* v. *Klock*, 210 F. 2d 217, 224 (C.A. 2) (conspiracy to misapply bank funds and to make false entries in bank books); *United States* v. *Cordo*, 186 F. 2d 144, 147 (C.A. 2), certiorari denied *sub nom. Minkoff* v. *United States*, 340 U.S. 952 (conspiracy to receive and possess goods stolen from interstate commerce); *United States* v. *Winters*, 158 F. 2d 674, 675 (C.A. 2) (conspiracy to steal goods moving as part of an interstate shipment); *Curtis* v. *United States*, 67 F. 2d 943, 947 (C.A. 10)

As *Pereira* makes clear, the critical determination is whether the substantive offense "*could* be accomplished by a single individual" without a conspiracy (*id.* at 11; emphasis added), not whether it was *in fact* accomplished without a conspiracy. The proper focus is upon the statutory definition of the crime, not upon the government's theory of the particular case. See *American Tobacco Co.* v. *United States,* 328 U.S. 781, 788–789.

C. WHARTON'S RULE IS ALSO INAPPLICABLE TO THE PRESENT CASE BECAUSE THE INDICTMENT CHARGED AND THE EVIDENCE SHOWED THAT THE CONSPIRACY INVOLVED MORE PERSONS THAN THE MINIMUM NUMBER NECESSARY TO COMMIT THE SUBSTANTIVE OFFENSE

Even if Section 1955 were construed to require proof that each of at least five participants in the gambling business "shared in the guilty knowledge and design" (*Morrison* v. *California, supra,* 291 U.S. at 93), so that a conspiracy among five persons would be necessarily included within the substantive crime, a traditional exception to Wharton's Rule would nevertheless permit separate punishment for the two offenses in this case. The exception provides that a conspiracy to commit a Wharton's Rule offense may be punished separately if "it contemplated the co-

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(conspiracy to make false entries in bank books); *Lisansky* v. *United States,* 31 F. 2d 846, 849–859 (C.A. 4), certiorari denied, 279 U.S. 873 (conspiracy to defraud the United States of income taxes due by filing false partnership tax return); *Laughter* v. *United States,* 259 Fed. 94, 97–98 (C.A. 6), certiorari denied, 249 U.S. 613 (conspiracy to cause intoxicating liquors to be transported in interstate commerce into a prohibition state); *Chadwick* v. *United States,* 141 Fed. 225, 236–237 (C.A. 6) (conspiracy to certify a check in the absence of sufficient funds).

operation of a greater number of parties than were necessary to the commission of the principal offense" (*Gebardi* v. *United States, supra,* 287 U.S. at 122, n. 6). See 1 Anderson, *Wharton's Criminal Law and Procedure, supra,* § 89, p. 193; Note, *Developments in the Law-Criminal Conspiracy,* 72 Harv. L. Rev. 920, 955–956 (1959).

The exception is fully consistent with the purpose of the rule itself. Multiple punishment is precluded under Wharton's Rule on the assumption that Congress took into consideration, in prescribing the punishment for the substantive crime, the dangers involved in any necessarily included combination of minds for a criminal purpose. When the combination includes more persons than the minimum number required to commit the substantive offense, however, the dangers of the conspiracy may be increased over those that are necessarily involved in commission of the principal offense. The presence of additional minds may facilitate the commission of the substantive offense and make more likely the commission of unrelated crimes. It should not be presumed, therefore, that the legislature intended to exclude punishment for the larger combination.

In the present case, the indictment charged that 25 persons (including 11 unindicted co-conspirators) had conspired to conduct an illegal gambling business in violation of 18 U.S.C. 1955 (A. 15). The jury found eight of those persons guilty of the conspiracy and of its substantive aim. Even if—contrary to our contention—Section 1955 is read as necessarily including a five-person conspiracy, it does not necessarily include

an eight-person conspiracy. Since the larger combination of minds carries with it a greater danger to society, separate punishment for the conspiracy is justified. This is the basis upon which the court of appeals rested its decision in the present case (Pet. App. 24a). See also *United States* v. *Becker, supra,* 461 F. 2d at 234.

In *United States* v. *Hunter,* 478 F. 2d 1019, certiorari denied, 414 U.S. 857, the Seventh Circuit applied Wharton's Rule to a case in which 14 persons were charged with conspiring to conduct an illegal gambling business. The court rejected the government's contention that the case fell within the exception to Wharton's Rule; that argument, the court stated, "merely emphasizes the number of persons charged in the indictment" and "does not identify an element of each offense which adequately differentiates the other" (478 F. 2d at 1026). Although 14 persons were alleged to have participated in the conspiracy, that charge "comprehends nothing more than the agreement which those persons necessarily performed by the commission of the substantive offense itself" (*ibid.*).

The conspiracy charge, however, does comprehend something more than the agreement inherent in the substantive crime. It requires proof that at least six persons were part of the conspiracy, whereas the participation of only five would be sufficient for conviction of the substantive crime. That additional element makes the conspiracy separately punishable for the same reasons that a conspiracy of two is separately punishable when the substantive crime can be committed by one.

The exception is most often applied where the additional conspirators are "third parties" who have not themselves participated in the commission of the substantive offense, such as where a matchmaker conspires with a man and a woman for the commission of adultery by them. See *United States* v. *Figueredo*, 350 F. Supp. 1031, 1035 (M.D. Fla.), reversed *sub nom. United States* v. *Vaglica*, 490 F. 2d 799 (C.A. 5), pending on petition for a writ of certiorari *sub nom. Scaglione* v. *United States*, No. 73-1503. The rationale of the exception, however, does not require a different result where all the conspirators also participate in the commission of the substantive offense. In both situations, the conspiracy is separately punishable because it involves a larger combination and therefore is more dangerous than the combination necessarily included within the substantive crime. Contrary to the reasoning of the district court in *Figueredo, supra*, 350 F. Supp. at 1035, it is the number of persons involved in the conspiracy, not the nature of their involvement, that determines whether the exception applies.

An agreement between two persons to engage in a duel or to commit adultery would pose no danger beyond what is inherent in the commission of the substantive crime. But a joint agreement among 30 persons to engage in a series of duels or to conduct an adulterous orgy would pose a greater danger to the interests fostered by the statutory prohibition. Though the example is an awkward one, it illustrates the point that the presence of additional conspirators may enhance the criminal threat of an otherwise

relatively innocuous combination, even though the additional conspirators are also participants in the substantive offense.

Thus, in *United States* v. *Benter*, 457 F. 2d 1174 (C.A. 2), the court correctly concluded that the exception to Wharton's Rule should be applied where a government employee conspired with four persons to receive a bribe from them.[23] Although the other four might each be characterized as participants in the substantive crime as givers of the bribe, the court found the exception applicable because "the agreement involved more participants than were necessary for the commission of the substantive offense" (457 F. 2d at 1178).[24]

D. THE RULE OF LENITY DOES NOT PRECLUDE SEPARATE PUNISHMENT FOR THE TWO OFFENSES IN THIS CASE

Petitioners invoke this Court's "rule of lenity" (*Gore* v. *United States*, 357 U.S. 386, 391) in support

[23] As we have indicated (pp. 24–26, *supra*), we believe that Wharton's Rule is inapplicable in any event to the crime of receiving a bribe, because that offense does not logically include a conspiracy.

[24] There are decisions reaching the opposite result on similar facts. See, *e.g.*, *United States* v. *Sager*, *supra*, 49 F. 2d at 728–729 (conspiracy by three persons to bribe a juror); *United States* v. *Hagan*, 27 F. Supp. 814 (W.D. Ky.) (conspiracy among three persons to harbor two of them as fugitives from justice); *United States* v. *New York Cent. & H. R. R. Co.*, *supra*, 146 Fed. at 304 (conspiracy among several givers and several receivers of an illegal rebate). These decisions, we submit, are inconsistent with the rationale of Wharton's Rule and its exception. Moreover, "insofar as these decisions are based upon agency doctrines, the increased danger from the additional minds should lead to the rejection of agency doctrines in such situations" (Note, *supra*, 72 Harv.L.Rev. at 956).

of their argument that separate punishment should not be permitted for a violation of Section 1955 and a conspiracy to commit it. But the rule of lenity applies only in limited circumstances not present in this case.

The "policy of lenity," this Court has explained, "means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended" (*Ladner* v. *United States*, 358 U.S. 169, 178). "The rule comes into operation [only] at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers" (*Callanan* v. *United States, supra,* 364 U.S. at 596). It "only serves as an aid for resolving an ambiguity; it is not to be used to beget one" (*ibid.*).

The policy of lenity has been invoked by this Court in two situations. First, where a statute and its legislative history are "unclear as to the appropriate unit of prosecution" (*ibid.*), the "doubt will be resolved against turning a single transaction into multiple offenses" (*Bell* v. *United States,* 349 U.S. 81, 84). On that basis, the Court has held that the simultaneous transportation for immoral purposes of more than one woman in the same vehicle is a single violation of the Mann Act (*Bell* v. *United States, supra*); that the wounding of two federal officers by a single discharge of a gun constitutes only one offense (*Ladner* v. *United States, supra*); and that an employer whose illegal policy results in a series of violations of the

minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act commits only a single criminal offense (*United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218).

Second, the rule has been applied in the context of the bank robbery statute to preclude separate punishment for a single course of conduct violating more than one provision of the statute. Thus, robbing a federally insured bank and entering the bank with intent to commit a felony are not "consecutively punishable in a typical bank robbery situation," because the "mental element" of intent to steal "merges into the completed crime if the robbery is consummated" (*Prince* v. *United States*, 352 U.S. 322, 324, 328). See also *Heflin* v. *United States*, 358 U.S. 415 (robbing a federally insured bank and receiving the proceeds of the robbery are not separately punishable).

A different result was reached, however, in *Gore* v. *United States, supra*, where the Court upheld consecutive prison sentences for a single sale of narcotics that violated three separate provisions of the federal narcotics laws. "Congress has manifested an attitude not of lenity but of severity toward violation of the narcotics laws," the Court stated, and there is no need for recourse to the rule of lenity where there have been "three violations of three separate offenses created by Congress at three different times, all to the end of dealing more and more strictly with * * * the traffic in narcotics" (357 U.S. at 391).

Moreover, where there is doubt concerning the intention of Congress with respect to the punishment of a substantive offense and the conspiracy to commit

it, the rule of lenity gives way to a contrary presumption that reflects the historic distinctiveness between the two crimes. Thus, in *Callanan* v. *United States, supra,* the defendant argued that Congress did not intend to subject him to separate punishment for obstructing interstate commerce by extortion and for conspiring to do so, because both of those offenses were created by the same section of the statute (18 U.S.C. 1951). The Court held, however, that a conspiracy and its substantive aim have always been viewed as separate crimes subject to separate punishment and that Congress should be presumed to have intended the usual punitive consequences of that distinction.

The Court stated, quoting from *United States* v. *Rabinowich, supra,* 238 U.S. at 88, that "[w]e attribute 'to Congress a tacit purpose—in the absence of any inconsistent expression—to maintain a long-established distinction between offenses essentially different * * *' " (364 U.S. at 594). As separate crimes, the conspiracy and the substantive offense are ordinarily punishable separately. "To dislodge such conventional consequences in the outlawing of two disparate offenses, conspiracy and substantive conduct, and effectuate a reversal of the settled interpretation * * * would require specific language to the contrary" (*id.* at 595).

The Court also specifically rejected a contention that the rule of lenity required a different result. Referring to its prior decisions in which it followed a policy of lenity to resolve doubts concerning the legislative purpose, the Court stated (*id.* at 597):

> Here we have no such dubieties within the statute itself. Unlike all of these cases, the problem before us does not involve the appropriate unit of prosecution—whether conduct constitutes one or several violations of a single statutory provision—nor is it an open question whether conspiracy and its substantive aim merge into a single offense. This is an ordinary case of a defendant convicted of violating two separate provisions of a statute, whereby Congress defined two historically distinctive crimes composed of differing components.

The present case is controlled by *Callanan*. If, as we have shown, a conspiracy is not necessarily included within the substantive offense defined by Section 1955, then Congress should be presumed to have intended that the commission of the substantive offense and a conspiracy to commit it would be separately punishable. As in *Callanan,* the petitioners here have been convicted of committing "two historically distinctive crimes composed of differing components" (*ibid.*), and there is no ambiguity that compels recourse to the rule of lenity.

II

EVEN IF WHARTON'S RULE WERE APPLICABLE TO THIS CASE, IT WOULD SIMPLY PRECLUDE CUMULATIVE PUNISHMENT; A NEW TRIAL WOULD NOT BE REQUIRED

If the Court determines, contrary to our contentions, that Section 1955 necessarily includes a conspiracy and that the exception to Wharton's Rule is not applicable in the circumstances of this case, then it must also consider petitioners' contention that the Court should reverse their convictions not only on the conspiracy count but also on the Section 1955 count

and should remand the case for a new trial. Petitioners reason that, "[i]f conspiracy to violate § 1955 is not a separate crime and separately punishable, there is no justification for submitting it to the jury" (Br. 24). By instructing the jury on a conspiracy for which petitioners could not be separately punished, they claim, the district court "permitted the jury to consider the guilt of the defendants by evidentiary standards which were fundamentally erroneous and incurably prejudicial" (Br. 25).

1. Petitioners' argument rests on the unstated premise that one may not be punished for a conspiracy to conduct an illegal gambling business not only when the substantive offense has been consummated, but also when there has been a conspiracy but no consummation of the substantive offense. Their claim is thus equivalent to an assertion that the conspiracy count should have been dismissed prior to trial because, under Wharton's Rule, there is no such offense as a conspiracy to conduct an illegal gambling business.[25]

We recognize that Wharton's Rule is frequently stated in a way that would appear to support petitioners' reasoning. Under Wharton's own formulation, the consequence of the rule's application is that "conspiracy * * * cannot be maintained" (Wharton, *supra,* § 1604, p. 1862). Thus, in *Gebardi* this Court referred to the rule as providing that, where the substantive offense presupposes "cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy"

[25] Indeed, petitioners did seek dismissal of the conspiracy count prior to trial (see Pet. App. 18a–20a).

(287 U.S. at 122). See also *Pinkerton* v. *United States, supra,* 328 U.S. at 643 (where the rule applies, "a conspiracy charge may not be added to the substantive charge"); *United States* v. *Katz, supra,* 271 U.S. at 355; *United States* v. *Holte, supra,* 236 U.S. at 145. We are also aware that the rule has in fact been applied on occasion to dismiss a conspiracy count joined with a substantive count or even a conspiracy count standing alone.

But we know of no case in which the result has been satisfactorily explained. The courts have simply invoked the traditional Wharton's Rule formulation without considering whether the rule's rationale requires the result apparently called for by the formulation. Only Wharton himself attempted to rationalize a dismissal of the conspiracy count, and that rationalization is unpersuasive. In support of his view that "conspiracy * * * does not lie" for concerted criminal action that is essential to commission of the substantive offense, Wharton stated: "* * * when the law says, 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is not lawful for the prosecution to call it by some other name; and when the law says, such an offense—*e.g.*, adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy" (Wharton, *supra,* § 1604, p. 1862).

This reasoning—which the courts have for years accepted uncritically—appears to rest upon a misreading of an 1850 decision that is generally regarded as

the first application of the rule that now bears Wharton's name. In *Shannon* v. *Commonwealth*, 14 Pa. 226, the defendants had been acquitted on a charge of adultery and were then indicted on a charge of conspiracy to commit the same adultery. The court held that the conspiracy indictment was barred on the ground that it "put the parties twice in jeopardy" for the same offense (14 Pa. at 227). "It is impossible to lay down a rule for all cases; but it may be said that where concert is a constituent part of the act to be done, as it is in fornication and adultery, a party acquitted of the major cannot be indicted of the minor. * * * [A]n indictment for the substance of the same thing in another form might be made a means of oppression" (*id.* at 227–228).

Assuming that the agreement of both partners was in fact an element of the adultery offense in Pennsylvania (see p. 23 and n. 14, *supra*), the decision was probably a correct application of the double jeopardy principle that precludes prosecution for an included offense after acquittal of the greater offense. See *Grafton* v. *United States*, *supra*, 206 U.S. at 349–352. The court in *Shannon* went beyond what was necessary to decide the case, however, to ridicule the notion that "an appointment for the indulgence of a passion or the gratification of a desire" should be the subject of criminal prosecution (14 Pa. at 228). "When an adulterous enterprise has been relinquished * * * it is impossible to believe that society has been so scathed by it, as to admit of no propitiation for it but public castigation" (*ibid.*). "[N]othing is more

ridiculous than a conspiracy to commit adultery" (*id.* at 227).

From these essentially gratuitous remarks, the Reporter inferred that the decision stood for these broad propositions: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act. There is no such offence as a conspiracy between a man and a woman to commit adultery" (Syllabus, *id.* at 226).

It was the Reporter's elaboration of the *Shannon* court's dicta, rather than the narrow holding of the case, on which Wharton apparently based the formulation of his rule. He stated, in effect, that, when conspiracy is necessarily included within a substantive offense, there can be no indictment for the conspiracy, at least where the substantive crime has been consummated, because in those circumstances there is no separate offense of conspiracy.

That Wharton's statement of the rule has found acceptance for so long attests, we submit, not to the essential soundness of his reasoning, but rather to the general influence of his treatise and its capacity to elevate a questionable principle to the status of an "established rule." As Mr. Justice Holmes reminded, however: "To rest upon a formula is a slumber that, prolonged, means death" (*Collected Legal Papers,* p. 306 (1921), quoted in *Callanan* v. *United States, supra,* 364 U.S. at 596).

In this case the formula should be discarded. As we have shown, Wharton's Rule, properly understood, is simply an application to conspiracy prosecutions of the more general rules with respect to greater and

necessarily included offenses. We submit that, when a substantive offense necessarily includes a conspiracy, an indictment charging a conspiracy to commit that offense should be treated in the same manner as an indictment charging any other offense that is included within some greater crime.

A charge of assaulting a federal officer (18 U.S.C. 111), for example, is not invalid merely because it is included within the greater crime of assaulting a federal officer with the use of a deadly weapon (*ibid.*). To apply Wharton's reasoning in this context would lead to the preposterous result that an indictment charging the lesser offense must be dismissed because the law separately proscribes the same conduct when it involves the use of a deadly weapon. The fact that the legislature has defined a greater crime does not mean that a person may not be indicted for a separate crime included within it. And that is as true with respect to conspiracies as it is with respect to assaults upon federal officers.

Nor is it improper to charge both the substantive offense and a necessarily included conspiracy in the same indictment. Even when an indictment is "multiplicitous" because it charges the *same* offense in more than one count, the multiplicity "is not fatal and does not require dismissal of the indictment" (1 Wright, *Federal Practice and Procedure* § 145, p. 336 (1969)).[26] The same is true where an indictment

[26] That is so, Professor Wright explains, because "[t]he principal danger in multiplicity is that defendant will be given multiple sentences for the same offense" (§ 145, p. 336). Since multiple sentences would be illegal and therefore subject to correction at any time under Rule 35, Fed.R.Crim.P., the

charges a greater offense and an included offense in separate counts. *Ekberg* v. *United States, supra,* 167 F. 2d at 385 (C.A. 1).

In that event, however, the trial court would ordinarily instruct the jury to consider the greater offense first and to consider the included offense only if it finds that the defendant is not guilty of the greater crime. *Fuller* v. *United States,* 407 F. 2d 1199, 1227, 1230 (C.A. D.C., *en banc*), certiorari denied, 393 U.S. 1120; 1 Devitt and Blackmar, *Federal Jury Practice and Instructions,* § 17.11 (2d ed. 1970). Moreover, the included offense would not be submitted at all unless "the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater" (*Keeble* v. *United States,* 412 U.S. 205, 208). See also *Sansone* v. *United States,* 380 U.S. 343, 349–350; *Berra* v. *United States,* 351 U.S. 131, 134.[27]

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defendant would not be prejudiced by a multiplicitous indictment, except perhaps in the unusual situation, not present here, when so many separate counts are alleged that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes" (*United States* v. *Mamber,* 127 F. Supp. 925, 927 (D. Mass.)). See also *United States* v. *Ketchum,* 320 F. 2d 3, 8 (C.A. 2), certiorari denied, 375 U.S. 905; *United States* v. *Klein,* 247 F. 2d 908, 919 (C.A. 2), certiorari denied, 355 U.S. 924; cf. *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 225.

[27] The same rules apply regardless of whether the included offense has been separately charged in the indictment. See *United States* v. *Harary,* 457 F. 2d 471, 478–479 (C.A. 2); Rule 31(c), Fed.R.Crim.P. Where an indictment charges only a substantive Wharton's Rule offense, therefore, either the defense or the prosecution should be entitled to a conspiracy instruction if the evidence permits it. This would be an exception

Thus, contrary to petitioners' contention, there *is* a justification for submitting the included offense to the jury even though the defendant could not be punished cumulatively for the greater crime and the one included within it. The justification is that the jury may find the evidence insufficient with respect to the greater offense but sufficient with respect to the included offense. If, for example, a defendant were charged in separate counts with assaulting a federal officer and assaulting a federal officer with a deadly weapon, it would be appropriate to submit both counts to the jury—even though the defendant could not be given cumulative sentences on the two counts—if the evidence concerning the use of a deadly weapon were disputed. If that factual issue were resolved in the defendant's favor, the jury should still be free to consider whether he committed the assault without a deadly weapon.

Likewise, where an indictment charges the substantive offense of conducting an illegal gambling business together with a conspiracy to commit that crime—and if it is assumed that the conspiracy is necessarily included within the substantive offense—the proper procedure would be to submit both counts to the jury if there were a dispute over some element of the sub-

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to the general rule that the conspiracy must be separately charged in the indictment (see *Pettibone* v. *United States*, *supra*, 148 U.S. at 202). If, pursuant to such an instruction, the jury finds the defendant guilty of conspiracy, the sentence would be limited to the maximum prescribed for conspiracy or, if conspiracy carries a heavier penalty, the maximum prescribed for the substantive offense. In the present context, a violation of Section 1955 is punishable more severely than a conspiracy to commit the violation (see note 21, *supra*).

stantive crime that is not required for conviction of the conspiracy—for example, the number of persons actually involved in the operation, the number of days it had been operated, or the amount of its revenues.[28] There would be no reason in such circumstances to immunize the defendant from punishment for a completed conspiracy merely because the substantive offense at which the conspiracy was aimed was never consummated.[29]

Even Wharton agreed that his rule should be applied only where the substantive crime has been con-

[28] The district court instructed the jury in this case that "[i]t would be theoretically possible * * * that if the business were underway and only reached a total of four, that there would be no violation of Section 1955, but there still could be a conspiracy charge on the part of those who planned the agreement to ultimately make a business of five, even though they never actually reached five" (A. 60).

Petitioners contend that the "fanciful hypothetical potential conspiracies the government may envision in aid of argument" (Br. 23–24) would not justify submitting both counts to the jury, because "[t]here has never been a federal prosecution for conspiracy to violate § 1955 which was not coupled with a prosecution for the violation of the substantive offense" (Br. 23). But the contention is a *non sequitur*. That grand juries have returned indictments charging both the substantive crime and a conspiracy to commit it does not mean that the evidence in all cases will be sufficient in the minds of petit jurors to warrant conviction of the substantive crime. The evidence may fall short on one element of the substantive offense even though it is sufficient to prove a conspiracy.

[29] "That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it. * * * [Wharton's] rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime" (A.L.I., *Model Penal Code*, Tent. Draft No. 10, Comment on § 5.04(2), p. 173 (1960)).

summated.[20] What he apparently failed to recognize is that the determination whether the crime *has* been consummated is for the jury to make. One cannot say with assurance prior to a verdict whether the evidence will result in a conviction of the substantive offense, and there is no reason to require the prosecution to elect at the time of indictment whether to prosecute the substantive crime or the conspiracy.

There is time enough after verdict to ensure that no impermissible double punishment is imposed. If the jury is properly instructed, it should return a verdict of guilty, if at all, on no more than one of the two counts. If it determines that the defendant is guilty of the substantive offense, it need not even consider the conspiracy charge, and if it determines that the defendant is guilty of a conspiracy, it must first have concluded that he is not guilty of the substantive crime. In either event, the verdict would present no opportunity to impose double punishment, because there would be only a single conviction.

But even if the jury ignores its instructions—or if the court gives improper instructions—and it returns a verdict of guilty on both counts, the error can be easily corrected at the time of sentencing or on appeal. The trial court may avoid double punishment by imposing sentence only on the substantive conviction, or by imposing a single general sentence, or perhaps by imposing concurrent sentences on the two counts.

[20] "Of course when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable" (Wharton, *supra*, § 1604, p. 1862).

Ekberg v. *United States*, *supra*, 167 F. 2d at 385–386. In each case, the defendant would be subjected to no impermissible multiple punishment. Similarly, the appellate court could correct an illegal cumulative sentence either by vacating the sentence on the included offense or—if that would obviously frustrate the trial court's sentencing intentions—by vacating the sentences on both counts and remanding for resentencing.

2. The district court in the present case, because it concluded that Wharton's Rule was inapplicable, did not instruct the jury that it should consider the conspiracy count with respect to each defendant only if it determined that the defendant was not guilty of the substantive gambling offense. The jury, as a consequence, returned verdicts of guilty on both counts as to all eight petitioners. Each was sentenced to imprisonment and a subsequent period of probation on the Section 1955 count and to probation on the conspiracy count to run concurrently with the probation on the Section 1955 count. In the case of seven of the petitioners, however, the probation on the conspiracy count would extend for two years beyond the probation on the Section 1955 count (*see* note 3, *supra*). Their sentences on the two counts are, therefore, technically cumulative.

If this Court determines that Wharton's Rule is applicable, then the cumulative sentences cannot stand. We believe that the appropriate disposition in that event would be to vacate the judgment of the court of appeals and remand the case with directions to vacate

the sentences on the conspiracy count.[31] Since the district court imposed sentence principally on the Section 1955 count, and since those sentences would be unaffected, we think that this disposition would be consistent with the district court's sentencing intentions and would make it unnecessary to remand the case to that court for resentencing on the substantive count.

3. Even if petitioners were correct that the conspiracy count should not have been submitted to the jury in any form, a new trial would not be required. Vacating their conspiracy sentences would be a full remedy.

Petitioners claim that a new trial is required because the district court's instructions with respect to conspiracy permitted the jury to consider hearsay evidence that would not otherwise have been admissible with respect to the substantive count alone (Br. 20–22, 24, 25). That claim is incorrect for two reasons.

First, contrary to petitioners' suggestion, the exception to the hearsay rule for declarations of a co-conspirator made during the course of and in furtherance of the conspiracy is not limited to cases in which the indictment includes a formal charge of conspiracy. The rationale of that exception "is the notion that the conspirators are partners in crime" whom "the law deems * * * agents of one another"

[31] Petitioner Iannelli, whose probation on the conspiracy count is coextensive with his probation on the Section 1955 count, has made no showing that he would be prejudiced by the concurrent sentences. It may be appropriate, however, in the context of this case, to treat each of the petitioners in the same manner and to direct that his sentence on the conspiracy count be vacated also. See *Fuller* v. *United States*, *supra*, 407 F. 2d at 1233, n. 52.

(*Anderson* v. *United States*, No. 73–346, decided June 3, 1974, slip op. 6, n. 6). Declarations of one conspirator in furtherance of the conspiracy are thus admissible as against another member of the conspiracy for the same reason that "the declarations of an agent bind the principal * * * when the agent acts within the scope of his authority" (*ibid.*). The statements are admissible on the theory that they are "the statements of a party" (*Lutwak* v. *United States*, 344 U.S. 604, 617).

It follows that the existence of a conspiracy count in the indictment is not necessary for the application of the exception. See *St. Clair* v. *United States*, 154 U.S. 134, 149. "[I]t is enough if evidence, other than that whose admissibility is under challenge, disclosed" a conspiracy (*United States* v. *Annunziato*, 293 F. 2d 373, 378 (C.A. 2), certiorari denied, 368 U.S. 919). Where there is such independent evidence of a joint venture in crime, the hearsay declarations of a co-conspirator are "admissible on substantive counts even when there is no conspiracy indictment at all" (*United States* v. *Costello*, 352 F. 2d 848, 854, n. 4 (C.A. 2), reversed on other grounds *sub nom. Marchetti* v. *United States*, 390 U.S. 39).[32]

[32] Accord, *Ottomano* v. *United States*, 468 F. 2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Binder*, 453 F. 2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Berger*, 433 F. 2d 680, 683 (C.A. 2), certiorari denied, 401 U.S. 962; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C.A. 2); *United States* v. *Olweiss*, 138 F. 2d 798, 800 (C.A. 2), certiorari denied, 321 U.S. 744; *United States* v. *Weber*, 437 F. 2d 327, 337, n. 11 (C.A. 3), certiorari denied, 402 U.S. 932; *United States* v. *Smith*, 343 F. 2d 847, 849–850 (C.A. 6); *United States* v. *Tanner*, 471 F. 2d 128, 143 (C.A. 7);

Moreover, the absence of a conspiracy count in the context of a Wharton's Rule prosecution would be purely a formal omission, since a Wharton's Rule offense necessarily includes a conspiracy within it. Even if a conspiracy charge were essential for application of the co-conspirator exception to the hearsay rule, that requirement would be satisfied by an indictment charging a Wharton's Rule offense.

The upshot is that the hearsay evidence of which petitioners complain would be no less admissible upon a retrial on the substantive count alone than it was in the first trial.

Second, the district court did *not* instruct the jury that it could consider the hearsay declarations with respect to the substantive count. Although the court should have permitted such consideration for the reasons we have indicated, it charged the jury instead that the statements of conspirators in furtherance of the conspiracy "would not be admissible in proving guilt under the second count [Section 1955], but it could be admissible under the circumstances I just enumerated with you in proving the guilt of conspiracy" (A. 61). There is no reason to believe that the jury ignored that explicit instruction.

United States v. *Mendell*, 447 F. 2d 639, 642 (C.A. 7), certiorari denied, 404 U.S. 991; *United States* v. *Schroeder*, 433 F. 2d 846, 849 (C.A. 8), certiorari denied *sub. nom. Allen* v. *United States*, 400 U.S. 1024; *United States* v. *Ushakow*, 474 F. 2d 1244, 1245 (C.A. 9); *United States* v. *Williams*, 435 F. 2d 642, 645 (C.A. 9), certiorari denied, 401 U.S. 995; *Mares* v. *United States*, 383 F. 2d 805, 809–810 (C.A. 10).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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